



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF E-P-F-S-, LLC

DATE: SEPT. 14, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a wholesale food distributor, seeks to temporarily employ the Beneficiary as a “distribution & logistics manager” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not demonstrated that the proffered position qualifies as a specialty occupation. The Petitioner submitted an appeal of the Director’s decision. We reviewed the record of proceedings and dismissed the appeal, finding that it did not contain sufficient evidence to establish that the Petitioner would employ the Beneficiary in a specialty occupation position. Thereafter, the Petitioner filed motions on August 31, 2015 and February 3, 2016. We denied the motions.

The matter is again before us on a combined motion to reopen and reconsider. We will deny the combined motion.

I. MOTION REQUIREMENTS

A. Overarching Requirement for Motions by a Petitioner

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a U.S. Citizenship and Immigration Services (USCIS) officer’s authority to reopen the proceeding or reconsider the decision to instances where “proper cause” has been shown for such action: “[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.”

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B, Notice of Appeal or Motion, that is properly completed and signed, and accompanied by the correct fee), but the petitioner must also show proper cause for granting the motion. As stated in the provision at

8 C.F.R. § 103.5(a)(4), “Processing motions in proceedings before the Service,” “[a] motion that does not meet applicable requirements shall be dismissed.”

B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “*Requirements for motion to reopen*,” states:

A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence. . . .

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states:¹

Motion to Reopen: The motion must state new facts and must be supported by affidavits and/or documentary evidence that established eligibility at the time the underlying petition or application was filed.

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “*Requirements for motion to reconsider*,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states:

Motion to Reconsider: The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.

¹ The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part: “Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 C.F.R. chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.”

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

A motion to reconsider should not be used to raise a legal argument that could have been raised earlier in the proceedings. *See Matter of Medrano*, 20 I&N Dec. 216, 219 (BIA 1990, 1991) (“Arguments for consideration on appeal should all be submitted at one time, rather than in piecemeal fashion.”). Rather, any “arguments” that are raised in a motion to reconsider should flow from new law or a *de novo* legal determination that could not have been addressed by the affected party. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006) (examining motions to reconsider under a similar scheme provided at 8 C.F.R. § 1003.2(b)); *see also Martinez-Lopez v. Holder*, 704 F.3d 169, 171-72 (1st Cir. 2013). Further, the reiteration of previous assertions or general allegations of error in the prior decision will not suffice. Instead, the affected party must state the specific factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision. *See Matter of O-S-G-*, 24 I&N Dec. at 60.

II. DISCUSSION

Our review here is limited to the most recent decision in the record of proceedings. 8 C.F.R. § 103.5(a)(1)(i) and (ii). That is, our May 24, 2016, decision is the subject of the combined motion currently before us.² Thus, while the Petitioner primarily focuses on the Director’s denial of the petition and our decision dismissing the appeal, we note that its assertions pertinent to those matters will not be considered because the propriety of those decisions is not before us.

In support of the motion, the Petitioner submits the following documentation:

- A brief;
- Our prior decision;
- Invoices indicating that other companies shipped food and ingredients to the Petitioner, and that the Petitioner shipped food and food service goods to restaurants; and,
- The Petitioner’s Schedule K-1 of the 2015 Form 1120S, U.S. Income Tax Return for an S Corporation.

For the reasons discussed below, the combined motion will be denied.

² Our decisions prior to May 24, 2016, are not under review. Whether to reopen or reconsider those decisions would not be considered unless the Petitioner prevailed on the instant motion.

A. Denial of the Motion to Reopen

In this motion, the Petitioner continues to assert that the proffered position of distribution and logistics manager is a specialty occupation and quotes the *Occupational Outlook Handbook's* (*Handbook*) chapter entitled "Logisticians" in support of its assertion.³

We are not persuaded by the Petitioner's assertion as it has not presented evidence that could be considered "new facts." For instance, the Petitioner submits the same kind of evidence that it did on the previous motion, which were invoices and a tax document. We considered the documentation and found it to be insufficient. Furthermore, the Petitioner's arguments focus on the denial of the petition, rather than on our most recent decision (which is the subject of the motion before us). Finally, the Petitioner has not established that the information provided with the instant motion would change the results of the case.⁴ As such, the Petitioner's motion does not satisfy the requirements of a motion to reopen.

B. Denial of the Motion to Reconsider

Nor does the Petitioner's motion satisfy the requirements of a motion to reconsider. On motion, the Petitioner asserts that the proffered position qualifies as a specialty occupation under the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), (2), and (3) and reiterates some of its previous arguments.⁵ The Petitioner, however, does not address the denial of the prior motion. It does not state any specific factual and legal issues raised on motion that were decided in error or overlooked in the decision. The Petitioner does not articulate how the denial of the prior motion was based on an incorrect application of law or policy when it was rendered. Accordingly, the Petitioner has not met the requirements for a motion to reconsider.

III. CONCLUSION

The combined motion does not meet the requirements for a motion to reopen or a motion to reconsider. Therefore, the combined motion will be denied.

The Petitioner should note that, unless the USCIS directs otherwise, the filing of a motion to reopen or reconsider does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

³ Notably, the Petitioner states that "the duties and responsibilities of the proffered position are those of an industrial engineer," which is a different occupational category from that of the occupational category "Logisticians." No explanation for this inconsistency was provided.

⁴ The occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the H-1B regulations, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

⁵ As stated above, the reiteration of previous arguments or general allegations of error will not suffice. See *Matter of O-S-G-*, 24 I&N Dec. at 60.

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In visa petition proceedings, it is the Petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met. Accordingly, the combined motion will be denied, the proceedings will not be reopened or reconsidered, and our previous decision will not be disturbed.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of E-P-F-S-, LLC*, ID# 12104 (AAO Sept. 14, 2016)